UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Criminal No. 4:93CR14WS
PAUL B. CLARK,	)	
	)	Violation:
Defendant.	)	15 U.S.C. § 1

SUPPLEMENTAL RESPONSE OF THE UNITED STATES IN
OPPOSITION TO DEFENDANT'S MOTION FOR RULE 16 DISCOVERY

The United States files this Supplemental Response in opposition to the motion by the defendant, Paul B. Clark, for Rule 16 Discovery. The defendant is charged with participating in a conspiracy to rig bids submitted for the award and performance of contracts to supply dairy products to certain public school districts in eastern Mississippi, in violation of the Sherman Act, 15 U.S.C. § 1. Prior to the involvement of the federal government in this matter, the charged conspiracy was the subject of a civil lawsuit brought by the State of Mississippi. The State sued several dairy companies, including Flav-O-Rich, Inc. ("Flav-O-Rich"), the former employer of the defendant. In connection with the civil litigation, the State took discovery. Ultimately, the civil case settled.

Beginning in early 1991, a federal grand jury in the Southern District of Mississippi conducted a criminal investigation into the bid-rigging conspiracy that was the subject of the State's lawsuit. In connection with its probe, the grand jury subpoenaed

records from the State as well as from dairy companies doing business in Mississippi. Three dairy companies, including Flav-O-Rich, and five individuals pled guilty to federal criminal informations charging bid rigging on school milk contracts. The grand jury returned a one-count indictment against the defendant on July 22, 1993, charging him, also, with bid rigging. We direct the Court to pages two through eight of the attached "United States' Consolidated Response in Opposition to Defendant's Motion for a Continuance and Discovery" for a description of the procedural history of the civil and criminal investigations.

The defendant cites no authority, makes no specific reference to the Standing Discovery Order in this case, and ignores much of the plain language of Fed. R. Crim. P. 16 in petitioning the Court for an order directing the United States to disclose material which the defendant is either not entitled to have at this time, or is not entitled to have at all. The language which the defendant uses to frame his demand for additional discovery is indicative of his misunderstanding of federal criminal discovery law and practice:

> ". . . the Defendant moves the Court to order the United States to fully and completely comply with the provisions of Rule 16 and the prior order of this Court and in particular to produce for inspection by the Defendant and his counsel all records related to the

> prior civil action and all personnel records and tax records regarding government witnesses and records regarding immunity and prior statements by government witnesses."

Defendant's "Motion for Rule 16 Discovery" at page 3. The "provisions of Rule 16" and the "prior order of this Court," however, do not entitle the defendant, at this juncture, to any of the material he is demanding. The United States will address below each class of evidence for which the defendant seeks discovery. To his insistence that the United States "fully and completely comply" with its discovery obligations, the United States answers that it has done so.

Witness Statements

The defendant has yet to state the basis upon which Rule 16 and the Standing Discovery Order in any way compel the United States to produce immediately "prior statements by government witnesses" to him. See, e.g., United States v. Harris, 458 F.2d 670, 679 (5th Cir.), cert. denied, 409 U.S. 888 (1972)(Jencks Act request "wholly inappropriate" in Rule 16 motion); United States v. Lowenberg, 853 F.2d 295, 300 (5th Cir. 1988), cert. denied, 489 U.S. 1032 (1989)(neither Rule 16 nor Jencks Act require disclosure of witness statements until after witness has testified). Fed. R. Crim. P. 16(a)(2) explicitly excludes from pretrial discovery "statements made by government witnesses except as provided in 18 U.S.C. § 3500." Moreover, paragraphs

1(a) and 1(b) of the Standing Discovery Order, the "prior order" of the Court, do not require that Jencks Act material be provided until "at least five (5) calendar days prior to trial." In the event that the defendant complies with his discovery obligations under paragraphs 2, 3, 4, and 6 of the Standing Discovery Order, the United States will turn over Jencks Act statements to the defendant in accordance with the time-table set by the Order. The defendant has no claim, whatsoever, under Rule 16 or the Standing Discovery Order to demand that the United States now furnish him with the statements of its prospective witnesses.

Although he has not made the argument in his written motion, the defendant may argue at the hearing that he should be provided witness statements, pretrial, pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). See Harris, supra, United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979); United States v. Thevis, 84 F.R.D. 47 (N.D.Ga. 1979). 1/ Brady requires that the United States produce "at the appropriate time" requested evidence materially favorable to the accused either as direct or impeaching evidence. Williams v. Dutton, 400 F.2d 797, 800 (5th Cir. 1968), cert. denied, 393 U.S. 1105 (1968). We will address the issue of impeachment material below. As regards exculpatory evidence, the weight of authority in the Fifth Circuit holds that when

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1/ The United States has fulfilled its obligations under Brady

and has exceeded the requirements of the the Standing Discovery Order by giving the defendant the substance of a witness' grand jury testimony which, arguably, contained exculpatory information. The discussion in the text above anticipates a contention by the defendant that he believes there is other exculpatory material in other witness statements which has not been provided.

that evidence is contained in Jencks Act statements, disclosure is generally timely when the United States complies with the Jencks Act, even if the disclosure is not made until trial. See, e.g., United States v. Brown, 699 F.2d 704, 709 (5th Cir. 1983); United States v. Martino, 648 F.2d 367, 384 (5th Cir. 1981), cert. denied, 456 U.S. 943, 102 S.Ct. 2006 (1982); United States v. Anderson, 574 F.2d 1347, 1352 (5th Cir. 1978). In line with this authority, Paragraph 1(a) of the Standing Discovery Order does not require the United States to produce any witness statements containing possible Brady material until the time for production of all other Jencks Act statements.

The defendant's sweeping demand that the United States further disclose "evidence of prior statements of witnesses which have not been produced" apparently is directed at any statement made by any individual, irrespective of whether the United States intends to call the person to testify in its case-in-chief. Absent any exculpatory information in the statements, however, the United States has no obligation -- under Rule 16, the Jencks

Act, the Standing Order, or Brady and its progeny -- to produce statements or the substance of statements made by individuals whom the government does not plan to call as witnesses. The defendant's demand for the pretrial production of statements made by the government's potential witnesses, and by everybody else as well, borders on the frivolous.

Witness Impeachment Material

Paragraph 1(a) of the Standing Discovery Order requires the United States to provide the defendant with exculpatory material "as soon as possible or as soon as discovered." As noted above, the United States has done this. The defendant demands, however, that the Court order the United States to produce tax records of government witnesses and records regarding witness immunity. The defendant, in other words, is asking for material with which to impeach the government's potential witnesses, unless he can explain how someone else's tax records or immunity agreement will exculpate him. Paragraph 1(b) of the Standing Discovery Order, however, specifies that impeachment material need not be produced until Jencks Act statements are produced.

At a hearing on December 21, 1993, before the District Court on a motion ancillary to this one, the defendant argued that under paragraph 1(a) of the Standing Discovery Order, impeachment material is required to be produced at the same time as exculpatory material. If the defendant is saying that Brady material encompasses both exculpatory evidence and impeaching

evidence, he is correct. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380 (1985); United States v. Miranne, 688 F.2d 980, 988, (5th Cir. 1982), cert. denied, 459 U.S. 1109 (1983). The defendant, however, is wrong to read the Standing Discovery Order as making no differentiation between the time the United States must disclose exculpatory evidence and the time it must provide impeachment material. If the defendant is saying that all Brady material must be produced at the same time, he can only arrive at such a conclusion by reading the Standing Discovery Order no farther than its first page. Paragraph 1(b) of the Order explicitly provides that Giglio material need not be disclosed by the United States until five days before trial. Unequivocally, therefore, paragraph 1(a) of the Standing Order requires that the United States disclose impeachment material, at the earliest, five days before trial.

All Records Related to the Prior Civil Action

The defendant is charged with a felony; he is not a defendant in a civil lawsuit. Discovery under the Federal Rules of Criminal Procedure is not intended to be as broad as that provided in civil cases. United States v. Ross, 511 F.2d 757, 762 (5th Cir.), cert. denied, 423 U.S. 836 (1975). Nor is there automatic, open-file discovery in federal criminal litigation. Unless documents and tangible objects within the possession of the government either belong to the defendant or are intended for use in the government's case-in-chief, Fed. R. Crim. P

16(a)(1)(C) makes such evidence discoverable only when it is material to the defendant's preparation of his defense. United States v. Reeves, 892 F.2d 1223 (5th Cir. 1990). The defendant claims that all of the State's records submitted to the grand jury are material to his defense, yet he makes no effort to carry his burden of showing materiality.

The defendant apparently believes he can establish materiality simply by virtue of the fact that the State of Mississippi once filed a lawsuit and obtained discovery related to the bid-rigging conspiracy for which the defendant is being criminally prosecuted. Materiality, however, "means more than that the evidence in question bears some abstract logical relationship to the issues in the case." Ross, 511 F.2d at 763. The defendant is required to provide the Court with "some indication that the pretrial disclosure of the disputed evidence would . . . enable[] the defendant significantly to alter the quantum of proof in his favor." Id. The defendant must do more than simply state, over and over, that the State's records are "material" and "important." Bare assertions do not constitute a legitimate basis under Fed. R. Crim. P. 16(a)(1)(C) to make wholesale demands for evidence.

Computer Records, Analysis, and
Summaries of School Milk Bid Documents

The "computer records" the defendant argues for are simply a compilation of Mississippi bid records that attorneys for the State of Mississippi codified in a data-base format. The

"analysis and summaries" are simply reports -- listings -- run from the data base. The bid records themselves have always been available to the defendant under the Mississippi Public Records Act of 1983, Miss. Code Ann. § 25-61-1 et seq. (1983). Moreover, in compliance with Rule 16 and the Standing Discovery Order, the United States made these same bid documents available to the defendant for inspection and copying on September 1, 1993. The United States has also provided the defendant with a list of each school district to which the defendant and his co-conspirators submitted rigged bids. Since September, the defendant has been in a position to review the relevant school milk bids he obtained through discovery, and to prepare a compilation of the winning and losing bids. He apparently has not done this, however, and is instead using this motion to secure a data base. If secured, the defendant will doubtless argue that he needs a third continuance of this simple and straightforward fraud case, indicted by the grand jury almost six months ago, so that he may check the data base for acccuracy. He will then begin the review he should have done himself, and completed by now.

At the December 21st hearing before the District Court, the defendant argued that the data base and summaries run from the data base are discoverable under Fed. R. Crim. P. 16(a)(1)(D). Such an assertion perhaps explains why the defendant avoids citing authority in his motion. The very language of Rule 16(a)(1)(D) makes plain that what is discoverable are "results or

reports of physical or mental examinations," and reports and results of "scientific tests or experiments" (emphasis added). See United States v. Buchanan, 585 F.2d 100 (5th Cir. 1978). A data-base summary of milk bids submitted by dairies to public schools in Mississippi is not a report of a physical or mental examination; nor are reports run from such a summary scientific tests or experiments. The data base is simply a listing of dairy bids taken from the very bids that the United States provided to the defendant on September 1, 1993, as part of the United States' discovery obligations. Rule 16 simply does not make the State of Mississippi's data base discoverable absent an intention by the United States to use the material in its case-in-chief.

Ultimately, however, this issue may be moot. The United States learned on December 29, 1993, that the data base the defendant seeks was put into the public record in the Commonwealth of Kentucky, where it apparently was used to illustrate rigged bids. It may be, therefore, that the data base is the defendant's for the asking.

Conclusion

The United States recognizes its continuing duty to provide to the defendant potentially exculpatory information pursuant to Brady and the Standing Discovery Order. It also recognizes its duties under Rule 16, the Jencks Act and Giglio. The defendant has come before this Court alleging that the United States has not complied with its obligations under Rule 16 and the Standing

Discovery Order. This is a bold contention, given that, to date, the government has fully met its discovery obligations whereas the defendant has not provided the United States with any reciprocal discovery, as he is required to do under the Federal Rules of Criminal Procedure and the Standing Discovery Order. Defendant cites no provisions of Rule 16, nor of the Order, nor does he cite any case law, to support his petition to this Court. He cannot do so, because the United States has met its discovery obligations. The defendant has no entitlement to the immediate production some of the material he is demanding, and no entitlement to the remainder of what he seeks. We ask the Court to deny the defendant's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent, via facsimile to:

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This 2nd day of January, 1994.

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